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INSIDE

FAIR LABOR STANDARDS ACT

The long-awaited overtime rule is here...Now what?

"Some people are going to get more money, some people are going to get more time, and everybody is going to get clarity," according to Labor Secretary Tom Perez, speaking to reporters on a White House press call late on May 17 as the administration was poised to unveil its long-anticipated revisions to the FLSA "white collar" overtime rules. Which of these purported benefits, if any, will a given employee receive after the rule change takes effect December 1? In large part, that will be up to employers.

The worker wins? The DOL estimates that an additional 4.2 million U.S. workers will be newly entitled to overtime protections as a result of the rule revisions, which more than double the salary threshold under which overtime pay is guaranteed. (The administration says workers will get roughly $12 billion more in higher wages over the next decade as a result.) Alternatively, workers will benefit from more time off the job if employers choose to comply by reining in employees' work hours so they don't work past 40 in a workweek, according to the administration. Finally, less tangibly, another 8.9 million salaried workers who fall somewhere between the old and new salary floors will have a clearer understanding of their overtime eligibility and, therefore, can better stand up for their rights under the FLSA, according to Perez. "It's a form of insurance policy," he said. "You'll know that because you're below the threshold, you can't be asked to work overtime without pay."

Indeed, employers "retain considerable flexibility in how they comply with the new rule," a White House statement noted. "Companies are going to be faced with a choice: Either they pay those workers overtime, or they cap their workweek at 40 hours," Vice President Joe Biden told reporters. "Either way, the worker wins."

Not so fast, says Andrew Volin, a partner in the Denver office of Sherman & Howard, which represents employers in wage-hour litigation and other employment disputes. "A natural reaction is 'hooray, the government just gave us a raise,' but that might not turn out to be true," Volin said. "Only a lucky few should expect an outright raise."

Who will be most affected? "At such a high salary level, I dare say that there are just a few employers with exempt employees that are not impacted," said Alfred B. Robinson, Jr., a shareholder in the Washington, D.C., office of Ogletree Deakins, who formerly served as acting administrator of the DOL's Wage and Hour Division. "The impact will be felt across many types of employers, including small and large employers, nonprofit entities, local governments, and educational institutions.

"Rather than types of employers impacted," he added, "I think there are just a few regions or metropolitan areas of the country where the new salary amount will *not* have a significant impact."

Wolters Kluwer

The largest groups of *employees* likely to be affected are managers, assistant managers, and supervisors in retail, restaurants, manufacturing, and healthcare, though many employees in other jobs and industries will feel the effects as well, according to Paul DeCamp, a principal in the Washington, D.C., office of Jackson Lewis, who served as DOL Wage-Hour Administrator under the Bush administration.

"Employees in certain parts of the country with more modest wage levels, such as the South, the Midwest, rural areas, and Puerto Rico, will be especially hard hit," he added. "These individuals are most likely to see their jobs reclassified to nonexempt, their hours cut, and their total pay decline steeply over the next six to eighteen months."

Compliance options. Volin set out five options for employers in contending with those currently exempt employees whose salaries will fall below the new minimum:

(1) Increase their salary level to maintain the exemption (and not worry about overtime);
(2) Divide their current salary by 40 hours and switch to hourly (and worry about overtime);
(3) Convert them from salaried to hourly based on actual hours worked, so the net cost is the same (although, Volin notes, this option assumes the employer has reliable information about hours worked, and final pay will vary with hours worked);
(4) Convert from salaried exempt to salaried nonexempt, and pay overtime for excess hours over 40 in a workweek;
(5) Utilize the fluctuating workweek method: The employee's salary covers all hours worked, including overtime (although special rules apply here—including advance notice and buy-in from employees).

A downside for workers? Employers will have to find the money to pay for the higher costs ushered in by the rule change, likely by hiking prices or cutting costs elsewhere, Volin pointed out. "There is still no such thing as a free lunch." Alternatively, employers will explore other measures to control labor costs in light of the revised overtime rules. Some may simply maintain an employee's 40-hour-plus workweek, but lower their hourly rate so that net payroll costs stay the same.

The DOL's Perez downplayed this prospect during Tuesday's press call. "We asked that question during our year-long outreach with employers," he said. "I haven't heard from one employer who said they'd lower the wage. Here's why: These [affected workers] are their most valuable employees. These are the workers who open the store, who close the store, who hire and fire, and bring the money to the bank. These are the most trusted people in their organization. You don't respond by lowering their salary. This is what experts would call behavioral economics: It's inconsistent with rational behavior to lower their salary."

So, while this outcome is "theoretically correct," Perez insisted, "in our review of the evidence we are not convinced that that will be the outcome."

Our panel disagreed. As Robinson pointed out, the final rule "discusses this option in some detail." And the National Retail Federation, which decried the DOL's overtime rule as "outrageous," cited a study indicating this is precisely the strategy that employers likely will use.

John Thompson, a partner in the Atlanta office of Fisher & Phillips, was equally skeptical. "I feel certain that a fair number of employers will set lower pay rates, reduce pay rates, adjust hours of work, or take other steps designed to avoid spending more on labor costs than they must," he said. "It might be that this can never be quantified in an economy as big and diverse as the United States is, but it will happen."

Jackson Lewis' DeCamp warned of the unintended consequences of the rule change when the proposed rule was first issued, fearing that it "will substantially reduce the pay of the very workers it purports to help" as employers adjust their hourly rate and/or hours downward in response. The final version, albeit slightly tempered from the proposal first floated last summer, did little to alter his outlook. "When employers realize that paying high hourly rates for overtime is not sustainable in the long run, many of these employees will see their schedules cut, resulting in a steep drop in pay," he predicts.

Sherman & Howard's Volin also envisions that some workers may stay at their current salary level but face a cut in

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their work hours, along with a corresponding reduction in benefits and other components of their compensation. "Small companies may not have the flexibility larger ones do, and so it might be more efficient to hire two part-time workers, who do not receive benefits, rather than keeping on one salaried worker whose salary just became more expensive," he observed.

Timekeeping, and other slights. Being converted to "hourly" will come with the consequent nuisance of having to track one's hours on a daily and weekly basis. "Exempt employees generally do not want to be nonexempt," DeCamp said. "They don't want to punch a clock or otherwise to have to report their time on a minute-by-minute basis, including noting when they leave for and return from lunch. They don't want to lose the guaranteed income that comes from being salaried. They don't want to lose prestige or respect in the workplace. They don't want to lose access to exempt benefits."

Detractors from the new overtime provisions also note the loss in employee flexibility that comes from reclassification to nonexempt status. But the DOL sought to rebuff this notion in a Q and A document on the new rule. "The FLSA does not require workers to punch a clock," the agency explained. "Moreover, the recordkeeping requirements of the FLSA do not limit the flexibility that an employer can afford to its workers." Granted, employers must keep accurate records of total hours worked, but they are not required to record start and end times, only total hours worked. "Employers can continue to permit their employees to work flexible hours as long as their total hours each day are accurately recorded."

"Demotion of millions of workers." DeCamp warned that employee morale will take a palpable hit, too, as newly nonexempt employees find themselves stripped of other perks of exempt status and the heightened stature that it affords in some workplaces. "The morale problems associated with having employees who feel that they have just been demoted will be enormous," he said. "This will also affect issues like recruiting for these positions as well as access to skills development and career progression. The upcoming demotion of millions of workers will hurt the career and earnings trajectories of many of these individuals for the rest of their working lives."

Congressional Republicans have voiced similar concerns regarding the rule's negative impact on professional growth. House Education and the Workforce Committee Chairman John Kline (R-MN) and Workforce Protections Subcommittee Chairman Tim Walberg (R-MI) issued a joint statement contending that, "[b]ecause of this rule, many Americans will soon realize they have fewer job prospects, less flexibility in the workplace, and less opportunity to move up the economic ladder." Likewise, Henry G. (Hank) Jackson, president and CEO of the Society for Human Resource Management (SHRM), said the changes mean that "many employees will lose the professional 'exempt' status that they have worked hard for and the flexibility from rigid schedules that they care deeply about."

"By dramatically increasing the wage threshold for determining a restaurant manager's overtime eligibility, key management positions will be eliminated, restaurant employee career advancement will be derailed and workplace morale will plummet," said Rob Green, executive director of the National Council of Chain Restaurants, in a statement opposing the new rule.

"These rules are a career killer," echoed David French, the National Retail Federation's Senior Vice President for Government Relations. "With the stroke of a pen, the Labor Department is demoting millions of workers."

The challenges ahead. As for the employers of these newly nonexempt workers, the hurdles in implementing the rule change are numerous, as Fisher & Phillips' Thompson notes. He cited some of the more vexing practicalities of dealing with those employees who will no longer be exempt:

- How will they be paid?
- How will the financial impact of complying be balanced against the realities of a finite amount available to devote to labor costs?
- How will the employer ensure that it is keeping accurate records of hours worked for them?
- How will it deal with the adverse employee-relations effects brought on by the status change?

What to do now. Thompson offered practical tips for employers looking to fall in line by December. "Right now," he urged, employers should be:

- analyzing whether the requirements that employers had been relying on in classifying employees as exempt under the white collar provisions continue to be met;
- evaluating what might be changed about one or more jobs so that the incumbents may be treated as exempt in the future;
- considering whether alternative FLSA exemptions could apply; and
- developing FLSA-compliant pay plans for employees who have been treated as exempt but who no longer will be.

"Assessing which positions to reclassify, deciding how to compensate these reclassified employees, communicating this change to the affected employees, modifying and reprogramming information systems, and then making the adjustments to comply are all major challenges under the FLSA and this final rule," Ogletree Deakins' Robinson explained.

"Fortunately, many employers already had begun this process, and the final rule gives employers until December 1, 2016, to comply. They have their work cut out for them." ■

Source: *"The overtime rule is here. Now what?" written by Lisa Milam-Perez, J.D. and published in the May 18, 2016 edition of Employment Law Daily, a Wolters Kluwer Law & Business publication.*

EQUAL EMPLOYMENT

Tips for introducing gender neutral bathrooms in the workplace

The question: *Where do I go to the bathroom?* is not so easily answered in the workplace today. Gender neutral bathrooms (open to all) may be introduced in many organizations in an effort to avoid issues with gender specification (biology v. identification). This change is not just a matter of creating new signs and announcing the policy to employees. For many the change will be difficult, stirring up strong emotions, discomfort and possibly hostility. Behavior and attitude may be adversely affected as workers wrestle with privacy issues, religious beliefs and overall confusion. Human Resources Directors and staff need to take a long hard look at these potential problems and pave the way for a smooth transition.

A few thoughts on how to do this:

1. Provide a clear explanation

When rolling out the policy, it is important to make it both official and personal. This means that in creating the official announcement you adhere to company policies and consult legal counsel. The personal aspect means that you address the employees on an individual level within each department. This is accomplished by meeting first with management teams. Explain and discuss the policy, and instruct managers to share with staff in small groups. Guide managers on how to effectively lead these meetings.

The tone needs to be open and welcoming; all voices will be heard and all questions answered. It is also important to be informative and factual- clear expectations and information get everyone on the same page to move forward.

2. Welcome worker input

Once managers have explained the policy to the staff and answered questions, they need to open up the floor for discussion. Specifically this means that workers are invited to share not only their feelings and problems with the policy, but also their ideas and suggestions. Ask: *What might we (HR and Management) do to help you with this?* Respond honestly: *we can't do that because…. That might be something we could offer. I'll check it out and get back to you.* Workers will appreciate being heard and their ideas considered, whether you implement them or not. The point is, you have directly addressed and involved the employees.

3. What happened? Take the temperature

Managers should 'take the temperature' of the meeting and discuss with HR. This means managers tune in and notice reactions and behavior of the employees. Jane may be quiet, but it's clear she is distressed; Joe was very vocal and may act out against others; the group was agitated and confused.

These observations are crucial to determining next steps. Jane and Joe may need special attention at some point; it is important to keep an eye on how their behavior plays out. Communication among all levels ensures that employees will be effectively assisted through this process.

Transparency is key

The key to making a smooth transition to gender neutral bathrooms is to be transparent, clear and supportive with employees throughout the organization. Change of any kind is tough, and the move to gender neutral bathrooms is both sensitive and personal. Workers need to feel supported and properly informed to ensure a successful transition for all. Communicate effectively and honestly with your employees and you will not only pave the way for change, but you will also foster trust and strengthen bonds among workers. Next time there's a big change, employees will connect and assist each other and HR in making the necessary adjustments. ■

Source: *Article prepared exclusively for Wolters Kluwer Law & Business by Laura MacLeod, LMSW. MacLeod created "From The Inside Out Project®," based on two decades of experience as a union worker and with all levels of employment in mind to assist in maintaining a harmonious workplace. She is an adjunct professor in graduate studies at the Hunter College Silberman School of Social Work and speaks on conflict resolution, problem solving, and listening skills at conferences across the country.*

U.S. SUPREME COURT RULING

Clock on constructive discharge claim runs from actual resignation

Absent clear statutory language otherwise, a limitations period begins to run when a plaintiff has a "complete and present cause of action," so the 45-day limitations period for a postal worker to make an EEO report of constructive discharge began not from the date he agreed to resign but from the date he actually resigned, explained the Supreme Court, noting that resignation is part of a "complete and present" constructive discharge claim. For this and other practical reasons, the High Court vacated the dismissal of the former postal employee's complaint (*Green v. Brennan*, May 23, 2016, Sotomayor, S.).

[T]he Court held that a constructive discharge claim accrues—and the limitations period begins to run—when the employee gives notice of his resignation.

Agreed to resign or transfer. The postal employee, who had complained that his employer denied him a promotion because he is black, later was accused by supervisors of the crime of intentionally delaying the mail. In an agreement he signed December 16, 2009, the postal service agreed not to pursue criminal charges and he agreed to either retire or accept another position in a remote location for significantly less money. He chose to retire and submitted his resignation on February 9, effective March 31.

Constructive discharge claim. On March 22, 41 days after resigning but 96 days after signing the agreement, the employee reported his allegedly unlawful constructive discharge to an EEO counselor (an administrative prerequisite to filing suit under Title VII). His subsequent Title VII suit was dismissed based on the trial court's conclusion that his complaint was untimely because he had not contacted the counselor within 45 days of the "matter alleged to be discriminatory." The Tenth Circuit affirmed, holding that the 45-day limitations period started to run on December 16, the date the employee signed the agreement.

Limitations period runs when cause of action complete. Vacating that decision, the Supreme Court first explained that the regulatory text was not unambiguously clear and, under the standard rule for limitations periods, the period begins to run "when the plaintiff has a complete and present cause of action." As applied here, the High Court found three persuasive reasons to include the employee's actual resignation in the limitations period.

Cause of action complete *after* resignation. First, resignation is part of the "complete and present cause of action" in a constructive discharge claim, which has two basic elements: (1) discriminatory conduct that would compel a reasonable employee to resign; and (2) an actual resignation. Only after the employee resigns would he have a constructive discharge claim. Second, nothing in Title VII or the applicable regulation suggested an exception to the standard rule. Third, practical considerations supported application of the standard rule, including that it would make little sense and would do nothing to further the goals of a limitations period to start the clock running before a plaintiff could actually require suit. Nothing in the regulation required a two-step process requiring a plaintiff to file a complaint after an employer's discriminatory conduct, only to be then forced to amend to allege constructive discharge after resigning.

The Court further noted that the employee's resignation in this case was not a mere inevitable consequence of the postal service's alleged discriminatory conduct and that the goal of promoting conciliation through early EEO contact did not warrant treating a constructive discharge different from an actual discharge for purposes of the limitations period.

Based on the foregoing, the Court held that a constructive discharge claim accrues—and the limitations period begins to run—when the employee gives notice of his resignation. It was left to the Tenth Circuit to determine, in the first instance, the date that the postal employee in fact gave notice in this case. ■

Source: *Written by Lorene D. Park, J.D.*

CAREGIVERS

Employees who care for family members are suing and winning big

Employers of all types and sizes should take note of a new study released May 17 by the Center for WorkLife Law at the University of California, Hastings College of the Law. "Caregivers in the Workplace: Family Responsibilities Discrimination Litigation Update 2016" identifies workplace trends that have led to rapid growth in lawsuits brought by employees claiming discrimination related to providing care for family members. Cases were brought by employees with family responsibilities that range from pregnancy to caring for children, family members with disabilities and aging parents. The number of cases decided in the last decade more than tripled the number in the prior decade, and employees won 67 percent of the family responsibilities discrimination cases that went to trial.

"This report is a classic bad news/good news scenario," said report author Cynthia Thomas Calvert, Senior Advisor to the Center for WorkLife Law. "The bad news is that discrimination against employees with family responsibilities is on the rise. The good news is that we are starting to pinpoint when and why it occurs, which means that we can address its root causes."

Cost to employers. Family responsibilities discrimination litigation cost American employers almost half a billion dollars ($477 million) over the past decade (compared to approximately $197 million from 1996-2005). The actual amount is likely to be significantly higher, as many settlements are confidential. These figures also fail to capture the ripple effects of discrimination, including employee attrition and related replacement costs, damage to the company's public reputation and reductions in the morale and productivity of all employees.

The majority of family responsibilities discrimination lawsuits arose in connection with an employee's pregnancy or maternity leave. Paternity leave, adoption, lactation and care for sick children also triggered lawsuits. One quickly-growing area of such cases involves employees who care for sick or aging parents; the Center for WorkLife Law researchers anticipate that eldercare cases will become even more prevalent as America's population ages.

"Cases filed in the last decade tell us a lot about America's evolving workforce and families," continued Calvert. "Until employers adjust to the realities of families with all adults in the paid workforce and a significant growth in the number of older Americans who need assistance from their adult working children, it's unlikely we'll see a decrease in the number of cases filed."

Filing trends. The report analyzed 4,400 family responsibility discrimination cases filed in the United States over a 10 year period, and found a 269 percent increase in the number of such cases filed in the past decade over the previous decade. The data also show that men are filing such lawsuits at a growing rate. Sixty-seven percent of cases related to discrimination against pregnant workers.

"Unfortunately, these trends indicate that some employers still aren't getting it when it comes to discriminating against employees with family responsibilities," said Joan C. Williams, Founding Director of the Center for WorkLife Law. "This report shows us that employers need to be particularly vigilant when it comes to following laws related to pregnancy and lactation accommodation, as these life events account for the highest number of discrimination cases brought by workers."

Employers can take specific steps to reduce their vulnerability to litigation from employees. Such steps include:

- training supervisors about what constitutes family responsibilities discrimination and how to reduce it;
- adopting explicit written policies against such discrimination;
- instituting effective complaint procedures for workers who feel they are facing discrimination;
- and creating work coverage plans to maintain productivity during employee leaves and reduce the stigma associated with absences for family care. ■

SECURITY RISKS

Employers not preventing employee-caused security incidents

Experian Data Breach Resolution and Ponemon Institute have released an industry study revealing that while employee-related security risks are the number-one concern for security professionals, organizations are not taking adequate steps to prevent negligent employee behavior. The study, Managing Insider Risk Through Training & Culture, asked more than 600 individuals at companies that currently have a data protection and privacy training program to weigh in on the topic of negligent and malicious employee behaviors, as well as the consequences of poor security conduct and the effectiveness of training.

The study found that more than half (55 percent) of companies surveyed have already experienced a security incident due to a malicious or negligent employee. However, despite investment in employee training and other efforts to reduce careless behavior in the handling of sensitive and confidential information, the majority of companies do not believe that their employees are knowledgeable about the company's security risks. ■

PRIVACY

Can your employees take a selfie at work?

Many employers maintain policies prohibiting employees from using cell phones and other recording devices at work. The reasons for such policies range from maintaining productivity, to protecting customer and employee privacy, to eliminating the way that recording devices limit the free and candid flow of workplace exchanges.

While these concerns are certainly understandable, you should consider the implications that a recent decision by the National Labor Relations Board (NLRB) might have on your policies. Most recently, the agency invalidated an employer's policies restricting workplace recording, causing a shift in the legal landscape.

But taking workplace pictures isn't protected . . . is it?

In the Board decision of *Whole Foods Market Group, Inc.*, the NLRB held that "photography and audio or video recording in the workplace, as well as the posting of photographs and recordings on social media," are protected by the National Labor Relations Act so long as employees are acting "in concert for their mutual aid and protection and no overriding employer interest is present."

This means that the Board will now find a violation if your business maintains a blanket prohibition on workplace recording unless you can show you have a legitimate business reason. It's important to note that this rule applies to all workplaces, and not just ones with a unionized workforce.

The Board went on to specify a number of employee recording activities deemed to be protected, including:

- recording images of protected picketing;
- documenting unsafe workplace equipment or hazardous working conditions;
- documenting and publicizing discussions about terms and conditions of employment;
- documenting inconsistent application of employer rules; and
- recording evidence to preserve it for later use in administrative or judicial forums.

Consequently, the mere act of maintaining a policy (regardless of whether it is actually enforced) that prohibits workplace recording now constitutes a violation of the Act. Moreover, even absent such a policy, disciplining or discharging an employee for using a recording device as illustrated by any of the above examples would be considered a violation of the Act.

What can i do to protect my business interests?

As noted above, the Board does recognize that important employer interests may, in limited circumstances, override the general principle that protects the right to engage in workplace recording activities. In all likelihood, however, these exceptions will be narrowly construed.

Indeed, many genuine employer interests are likely to fall short of Board standards. In *Whole Foods*, for example, the Board found that the articulated rationale behind the policy at issue (encouraging the free flow of ideas by limiting the chilling effect of workplace recording) failed to overcome an employee's right to use such a device at work.

Protecting trade secret and other highly confidential business information may ultimately prove sufficient to overcome the Board's rule against recording policies, but such an argument has not yet been tested. Like other employer policies that have been challenged by the Board over the past several years, this is a rapidly developing area that you should monitor carefully.

Do I need to revise my handbook?

If you have a policy prohibiting your employees from recording in the workplace, you should consider having that policy reviewed in the near future to determine whether a revision is necessary. In addition to unions, employees and plaintiffs' attorneys are increasingly targeting nonunion employers with unfair labor practice charges challenging an array of policies and procedures. Recent examples include arbitration agreements prohibiting class action waivers, confidentiality policies, off-duty access restrictions, and social media policies.

You should regularly review your handbook to ensure you are keeping up with the quickly evolving rules adopted by the Board. Like the "no-recording" rule found unlawful in *Whole Foods*, you may be surprised by the seemingly common-sense policies that no longer pass muster. ■

Source: *"Can Your Employees Take A Selfie At Work?" written by Fisher & Phillips attorney Steven Bernstein. The article was originally published in the March 1, 2016 Fisher & Phillips Labor Letter. For more information, contact the author at SBernstein@laborlawyers.com or (813.769.7513). Reprinted with permission.*

WELLNESS PROGRAMS

New regulations map out ADA, GINA compliance for wellness programs

The EEOC has released a pair of final rules that map out the extent to which employers may offer inducements and incentives for participation in wellness programs without running afoul of the ADA and GINA. Published in the *Federal Register* on May 17, both final rules will be effective 60 days after publication, but would apply beginning on January 1, 2017. The two rules provide guidance to both employers and employees about how workplace wellness programs can comply with the ADA and GINA consistent with provisions governing wellness programs in the Health Insurance Portability and Accountability Act, as amended by the Patient Protection and Affordable Care Act (ACA).

Many employers offer workplace wellness programs intended to encourage healthier lifestyles or prevent disease. These programs sometimes use medical questionnaires or health risk assessments and biometric screenings to determine an employee's health risk factors, such as body weight and cholesterol, blood glucose, and blood pressure levels. Some of these programs offer financial and other incentives for employees to participate or to achieve certain health outcomes. According to the EEOC release accompanying the regulations, both of the new rules permit wellness programs to operate consistent with their stated purpose of improving employee health, while including protections for employees against discrimination.

The final ADA rule provides that wellness programs that are part of a group health plan and that ask questions about employees' health or include medical examinations may offer incentives of up to 30 percent of the total cost of self-only coverage. The final GINA rule provides that the value of the maximum incentive attributable to a spouse's participation may not exceed 30 percent of the total cost of self-only coverage, the same incentive allowed for the employee. No incentives are allowed in exchange for the current or past health status information of employees' children or in exchange for specified genetic information (such as family medical history or the results of genetic tests) of an employee, an employee's spouse, and an employee's children.

ADA final rule

The final rule amending the regulations and interpretive guidance implementing Title I of the ADA provides guidance on the extent to which employers may use incentives to encourage employees to participate in wellness programs that ask them to respond to disability-related inquiries and/or undergo medical examinations. This rule applies to wellness programs considered "employee health programs" under Title I of the ADA. The EEOC noted that a wellness program that is an employee health program may be part of a group health plan or may be offered outside of a group health plan or group health insurance coverage. All of the rule's provisions apply to all employee health programs that ask employees to respond to disability-related inquiries and/or undergo medical examinations. Conversely, wellness programs that do not include disability-related inquiries or medical examinations (such as those that provide general health and educational information) are not subject to the final rule; however, those programs must be available to all employees and must provide reasonable accommodations to employees with disabilities.

Safe harbor provision. As in the proposed rule, under the final rule, the safe harbor provision does not apply to an employer's decision to offer rewards or impose penalties in relation to wellness programs that include disability-related inquiries or medical examinations. Under the safe harbor provision, "an insurer or any entity that administers benefit plans is not prohibited from 'establishing, sponsoring, observing or administering the terms of a bona fide benefit plan based on underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with state law,'" the commission explained.

The EEOC specifically noted its disagreement with two court decisions that have applied the safe harbor provision "far more expansively to support employers' imposition of penalties on employees who do not answer disability-related questions or undergo medical examinations in connection with wellness programs." In both cases, *Seff v. Broward County* and *EEOC v. Flambeau, Inc.*, the employers did not use wellness programs in a manner consistent with the application of the safe harbor provision, according to the commission. "In neither Seff nor Flambeau did the employer or its health plan use wellness program data to determine insurability or to calculate insurance rates based on risks associated with certain conditions—the practices the safe harbor provision was intended to permit," wrote the EEOC. "Moreover, there is no evidence in either Seff or Flambeau that the decision to impose a surcharge or to exclude an employee from coverage under a health plan was based on actual risks that non-participating employees posed."

Incentive cap. Under the final rule, as in the proposed rule, an employer may offer incentives up to a maximum of 30 percent of the total cost of self-only coverage (including the employee's and employer's contribution), whether the incentive is a reward or penalty, to promote an employee's participation in a wellness program that includes disability-related inquiries and/or or medical examinations, so long as participation is voluntary. The 30-percent cap applies to all workplace wellness programs whether offered only to employees enrolled in an employer-sponsored group health plan; offered to all employees whether or not they are enrolled in such a plan; or offered as a benefit of employment where an employer does not sponsor a group health plan or group health insurance coverage.

Calculation of incentive. The final rule addresses calculating the permissible incentive cap in four situations:

1. Where participation in a wellness program depends on enrollment in a particular group health plan, the employer may offer an incentive up to 30 percent of the total cost of self-only coverage (including both employer and employee contributions) under that plan.
2. Where an employer offers a single group health plan, but participation in a wellness program does not depend on the employee's enrollment in that plan, an employer may offer an incentive of up to 30 percent of the total cost of self-only coverage under that plan.
3. Where an employer has more than one group health plan, but participation in a wellness program does not depend on the employee's enrollment in any plan, the employer may offer an incentive up to 30 percent of the total cost of the lowest cost self-only coverage under a major medical group health plan offered by the employer.
4. Where an employer does not offer a group health plan or group health insurance coverage, the rule uses the cost of the second lowest cost Silver Plan available through the state or federal health care Exchange established under the Affordable Care Act (ACA) in the location that the employer identifies as its principal place of business as a benchmark for setting the incentive limit. Therefore, an employer may offer incentives up to a maximum of 30 percent of the cost that would be charged for self-only coverage under such a plan if purchased by a 40-year-old non-smoker.

Type of incentive. Under the final rule, offering limited incentives (whether financial or in-kind) to encourage employees to participate in wellness programs that include disability-related inquiries and/or medical examinations will not render the program involuntary. But, the total permissible incentive available under all programs (participatory and health-contingent programs), whether part of, or outside of, a group health plan, cannot exceed 30 percent of the total cost of self-only coverage, which generally is the maximum permissible incentive available under HIPAA and the ACA for health-contingent wellness programs.

The final rule gives employers flexibility to determine the value of in-kind incentives as long as the method is reasonable. The EEOC declined to exclude *de minimis* incentives

Smoking cessation programs. As in the proposed rule, the final rule retains the distinction between smoking cessation programs that require employees to be tested for nicotine use and those that merely ask employees whether they smoke. Because a smoking cessation program that merely asks employees whether or not they use tobacco—or whether or not they ceased using tobacco upon completion of the program—is not an employee health program that includes disability-related inquiries or medical examinations, the 30 percent incentive limit does not apply. Accordingly, a covered entity may offer incentives as high as 50 percent of the cost of self-only coverage, as permitted by the regulations implementing Section 2705(j) of the Public Health Service Act, for such a program. However, because any biometric screening or other medical procedure that tests for the presence of nicotine or tobacco is a medical examination under the ADA, the 30 percent incentive cap would apply to those screenings or procedures.

GINA final rule

The final rule that amends the regulations implementing Title II of the Genetic Information Nondiscrimination Act of 2008 addresses the extent to which an employer may offer an inducement to an employee or the employee's spouse to provide information about the spouse's manifestation of disease or disorder as part of a health risk assessment (HRA) administered in connection with an employer-sponsored wellness program.

The final rule clarifies that an employer may, in certain circumstances, offer an employee limited inducements for the employee's spouse to provide information about the spouse's manifestation of disease or disorder as part of a HRA administered in connection with an employer-sponsored wellness program, *provided* that GINA's confidentiality requirements are met and any information obtained is not used to discriminate against an employee. This narrow exception to the general rule that inducements may not be offered in exchange for an employee's genetic information, however, does not extend to genetic information about a spouse or to information about manifestation of diseases or disorders in, or genetic information about, an employee's children.

Incentive cap. The final rule under GINA, like the final rule under the ADA, limits the maximum share of the inducement attributable to the employee's participation in an employer-sponsored wellness program (or multiple employer sponsored wellness programs that request such information) to up to 30 percent of the cost of self-only coverage. The maximum total inducement for a spouse to provide information about his or her manifestation of disease or disorder is likewise 30 percent of the total cost of (employee) self-only coverage, so that the combined total inducement will be no more than twice the cost of 30 percent of self-only coverage.

Smoking cessation. The final rule, like the proposed rule, provides that an employer-sponsored wellness program does not request genetic information when it asks the spouse of an employee whether he or she uses tobacco, ceased using tobacco upon completion of a wellness program, or when it requires a spouse to take a blood test to determine nicotine levels because these are not requests for information about the spouse's manifestation of disease or disorder.

Program design for both rules. Both rules also seek to ensure that wellness programs actually promote good health and are not just used to collect or sell sensitive medical information about employees and family members or to impermissibly shift health insurance costs to them, the EEOC said. The ADA and GINA rules require wellness programs to be reasonably designed to promote health and prevent disease.

Confidentiality. The two rules also make clear that the ADA and GINA provide important protections for safeguarding health information. The ADA and GINA rules state that information from wellness programs may be disclosed to employers only in aggregate terms.

The ADA rule requires that employers give participating employees a notice that tells them what information will be collected as part of the wellness program, with whom it will be shared and for what purpose, the limits on disclosure and the way information will be kept confidential. GINA includes statutory notice and consent provisions for health and genetic services provided to employees and their family members.

Both rules prohibit employers from requiring employees or their family members to agree to the sale, exchange, transfer, or other disclosure of their health information to participate in a wellness program or to receive an incentive.

Best practices

The interpretive guidance published along with the final ADA rule and the preamble to the GINA final rule identify some best practices for ensuring confidentiality, such as adopting and communicating clear policies, training employees who handle confidential information, encrypting health information, and providing prompt notification of employees and their family members if breaches occur. ■

Source: *81 FR 31126, May 17, 2016, and 81 FR 31143,*

HR QUIZ

What must be reported when a computer drive with protected health information is lost?

Q **Issue:** *One of your employees lost a computer drive that likely contained protected health information (PHI) covered by the Health Insurance Portability and Accountability Act (HIPAA). What self-reporting obligations, if any, does your company have?*

A **Answer:** The answer depends on whether the PHI was secured or unsecured.

"Unsecured" PHI is essentially PHI that has not been rendered technologically unreadable or unusable. If the PHI is unsecured, then the business may very well have a self-reporting obligation under HIPAA. (This assumes that the business is a "covered entity" for HIPAA purposes.)

The self-reporting obligation may not apply if the business can demonstrate that the lost computer drive (referred to as a "breach" in HIPAA parlance) presents only a low probability that the PHI has been compromised based on a risk assessment that considers a number of different factors.

If the self-reporting obligation does apply, it may be accomplished by notifying the affected individuals and the U.S. Department of Health and Human Services of the breach, and, if the breach is significant enough, the media. A failure to properly and timely issue such HIPAA breach notices could lead to significant penalties (in addition to any penalties that may apply as a result of the breach). If a business suspects that PHI has been compromised in any respect, it should contact qualified counsel promptly.

Source: *HHS Reg. Sec. 164.402.*

HR NOTEBOOK

CPI for all items increases 0.4% in April

The Consumer Price Index for All Urban Consumers (CPI-U) increased 0.4 percent in April on a seasonally adjusted basis, the U.S. Bureau of Labor Statistics (BLS) reported May 17. Over the last 12 months, the all items index rose 1.1 percent before seasonal adjustment. The seasonally adjusted all items increase was broad-based, with the indexes for food, energy, and all items less food and energy all rising in April. The food index rose 0.2 percent after declining in March. The index for energy increased 3.4 percent, with the gasoline index rising 8.1 percent, and the indexes for fuel oil and natural gas also advancing.

Real hourly earnings decrease in April

Real average hourly earnings for all employees decreased 0.1 percent from March to April, seasonally adjusted, the BLS reported May 17. This result stems from a 0.3-percent increase in average hourly earnings being more than offset by a 0.4-percent increase in the Consumer Price Index for All Urban Consumers (CPI-U).

Payroll employment increases by 160,000 in April

Total nonfarm payroll employment increased by 160,000 in April, and the unemployment rate was unchanged at 5.0 percent, the BLS reported May 6. The number of unemployed persons was little changed at 7.9 million. Job gains occurred in professional and business services (+65,000), health care (+44,000), and financial activities (+20,000). Job losses continued in mining (-7,000). Employment in other major industries, including construction, manufacturing, wholesale trade, retail trade, transportation and warehousing, information, leisure and hospitality, and government, showed little or no change over the month.

INJURY AND ILLNESS REPORTING

OSHA's final rule requires electronic reporting, creates public database

OSHA has released its final rule aimed at modernizing injury data collection to better inform workers, employers, the public, and OSHA about workplace hazards. The agency said that via the final regulation, it is applying the insights of behavioral economics to improve workplace safety and prevent injuries and illnesses. The final rule, which has been in the making since November 2013, was published in the Federal Register on May 12.

The final rule requires employers in certain industries to electronically submit injury and illness data to OSHA that employers are already required to keep under existing regulations. The frequency and content of these establishment-specific submissions is set forth in the final rule; it is dependent on the size and industry of the employer. OSHA intends to post data from these submissions on a publicly accessible website, but it will not post any information that could be used to identify individual employees.

Specifically, under the new rule, all establishments with 250 or more employees in industries covered by the recordkeeping regulation must electronically submit injury and illness information from OSHA Forms 300, 300A, and 301. Establishments with 20-249 employees in certain industries must electronically submit information from OSHA Form 300A only, OSHA said in a press release explaining the final rule's requirements.

Employee rights. In addition, the final rule amends OSHA's recordkeeping regulation to update requirements on how employers inform their employees about reporting work-related injuries and illnesses to the employer. The rule requires employers to inform employees of their right to report work-related injuries and illnesses free from retaliation; clarifies the existing implicit requirement that an employer's procedure for reporting work-related injuries and illnesses must be reasonable and not deter or discourage employees from reporting; and incorporates the existing statutory prohibition on retaliating against employees for reporting work-related injuries or illnesses. The rule also amends OSHA's existing recordkeeping regulation to clarify the rights of employees and their representatives to access the injury and illness records.

Effective date. The new requirements are effective August 10, 2016, with phased-in data submissions beginning in 2017. OSHA noted that these requirements do not add to or change an employer's obligation to complete and retain injury and illness records under the Recording and Reporting Occupational Injuries and Illnesses regulation. ■